274

May 24 - July 27

# Petition and Transcript of Record

## Supreme Court of the United States

OCTOBER TERM, 1926

## No. 531

CHARLES H. PHELPS, AS SURVIVING PARTNER OF HOWARD PHELPS AND CHARLES H. PHELPS, COPARTNERS, TRADING UNDER THE FIRM NAME, ETC., PETITIONER,

*vs.*

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

FILED JULY 27, 1926

(32,098)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 29, 1926

[fol. a]

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. —

CHARLES H. PHELPS, as Surviving Partner of Howard Phelps and Charles H. Phelps, Copartners, Trading under the Firm Name and Style of Phelps Bros. & Co. (Claimant Below), Petitioner,

against

THE UNITED STATES OF AMERICA (Defendant Below), Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Supreme Court of the United States:

The petition of Charles H. Phelps, as surviving partner of Howard Phelps and Charles H. Phelps, co-partners trading under the firm name and style of Phelps Bros. & Co., respectfully represents:

1. This is a petition for a writ of certiorari to review a final judgment of the Court of Claims of the United States in the case of Charles H. Phelps, as surviving partner of Howard Phelps and Charles H. Phelps, co-partners trading under the firm name and style of Phelps Bros. & Co., vs. The United States, No. C-1328 in that Court. It is a case in which petitioner's pier in the Bush Terminal, New York City, had been taken by the United States by eminent domain. The Court of Claims modified the report of its Commissioner, who fixed damages, by refusing an amount equivalent to interest from the date of the taking, which the Commissioner had allowed. A motion for a new trial was overruled by the Court of Claims on May 24, 1926.

2. The requisition order, which also took piers leased to Duckett and Co., to the Prince Line and to Booth & Co., was expressly made under the authority of two acts of Congress, that of August 29, 1916, which provided for the taking of "systems of transportation" and that of August

10, 1917, which provided for the taking of "storage facilities" (Finding VII).

[fol. b] 3. Petitioner believed that his pier, in so far as it furnished wharfage, was a part of a "system of transportation" under the act of 1916, and inasmuch as it was a covered pier, where goods were safely housed until they could be conveniently removed, was a "storage facility" under the act of 1917. Petitioner therefore believed that the taking was under both acts, as stated in the requisition order, but the language of neither act was so clear as to be free from argument.

4. The act of 1916 contained no provision as to how the value of the property taken should be fixed. The act of 1917 (commonly called the Lever Act) provided that the President should determine "just compensation," and if the amount fixed were not satisfactory the party aggrieved might accept 75% of the award and sue in the United States District Court for the balance claimed.

5. The requisition order of the Secretary of War here provided: "Steps will be promptly taken to ascertain the fair compensation" (Finding VII).

6. Thereafter, as required by the act of 1917, the President fixed the amount due Phelps Bros. & Co. (petitioner) and the other pierholders, 75% thereof was paid to them and suits were begun for the balance on the ground that the award was insufficient.

7. The Prince Line sued the United States in the U. S. District Court, under the Act of 1917, and recovered judgment, including interest, and that judgment was paid, no appeal being perfected.

Prince Line v. The U. S., 283 Fed. 535, 541.

8. Duckett & Co. sued for the taking of their pier in the Court of Claims, which denied recovery on the theory that there had not been a taking.

[fol. c] Duckett v. The U. S., 58 Ct. Clms. 234.

9. This court reversed the Duckett case, holding that there had been a taking by eminent domain and that Duckett & Co. were entitled to fair compensation for the taking.

Duckett v. The U. S., 266 U. S. 149, 151.

10. Interest, as such, cannot be awarded against the United States, unless contracted for or authorized, but in cases of takings by eminent domain, where the statute does not provide for interest, and payment is not made at the time of the taking, "just compensation" requires that remuneration be made for such delay, and interest will be awarded in such case, not as interest, but "interest at a proper rate is a good measure by which to ascertain the amount so to be added" (Seaboard Air Line Ry. v. U. S., 261 U. S. 299, at 306).

"And if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest as a proper rate is a good measure of the amount to be added." (Brooks-Scanlon Corp. v. the U. S., 266 U. S. 106 at 117, on appeal from the Court of Claims.

11. Both the U. S. Attorney General and Duckett & Co. interpreted that decision as holding that the Government's taking of the pier was an act of eminent domain under which the equivalent of interest from the date of the taking would be awarded as a part of "just compensation" and this was the judgment of the Court of Claims.

12. In the Duckett case the pier was taken January 31, 1918. The Court of Claims pursuant to the mandate of this Court on May 11, 1925, awarded interest, its order reading:

"It is ordered and adjudged that the plaintiff recover [fol. d] of and from the United States the sum of twenty-one thousand, six hundred and twenty-one dollars and thirty-five cents ($21,621.35), with interest thereon at six per cent (6%) from February 1, 1918.

May 11, 1925."

13. Since the judgment in the Court of Claims under the act of 1916 and the District Court under the act of 1917, both awarded interest and the decision in the Duckett case was made pursuant to the decision of this Court (in which it was said "there is no doubt concerning the jurisdiction of the Court of Claims"), petitioner concluded to prosecute the case in the Court of Claims.

14. The Commissioner of the Court of Claims, to whom the case at bar was referred, awarded an amount equivalent to interest from the date of the taking and the Attorney General filed the following sentence as his entire brief:

"The defendant has no objection to the facts in this case as found by the Commissioner, and on these findings and also on the authority of the case of A. W. Duckett & Co. Inc., v. U. S., 266 U. S. 147, respectfully submits the case for the consideration of the Court.

"Respectfully submitted."

Counsel for both sides thus agreed that the decisions of this Court allowed interest in just compensation cases, not as interest but as "a good measure of the amount to be added" where payment is delayed.

15. Nevertheless, the Court of Claims on March 8, 1926, rendered an opinion, disallowing the interest fixed by its Commissioner, this ruling being in direct conflict with the same court's judgment in the Duckett case.

16. Thereafter the Government made a motion to correct the judgment in the Duckett case by striking therefrom the words "with interest thereon at six per cent (6%) from February 1, 1918," though it had been decided nearly a year before on May 11, 1925, and your petitioner thereupon requested a rehearing of the interest question in the case at bar. His request was granted and this case and the Duckett case were both heard on May 3, 1926. On May 24, 1926, the Court of Claims handed down a decision holding that [fol. e] your petitioner could not be allowed any compensation for delay in payment and the time to apply for a writ of certiorari therefore runs from that date (Citizens Bank of Michigan City, Indiana, v. Opperman, 249 U. S. 448). On the same day it amended its judgment in the Duckett case, disallowing the interest previously awarded.

17. As it is admitted that interest would be given under the Lever Act, one of the acts under which the property was taken, failure to obtain it is apparently upon the supposition that petitioner sued in the wrong court. Mr. Chief Justice Campbell said (Record p. 35):

"In the instant case, the notice having referred to two acts, no reason is apparent why the plaintiff may not elect whether he will sue in the Court of Claims for a taking authorized by the first named act (that of 1916) or in the District Court under the Lever Act" that of 1917).

18. Your petitioner's error on this supposition, was that he followed the basic principle of the common law and continued his case in the Court of Claims where he had an express precedent in the Duckett case that interest would be allowed, as the law stood at the time of its submission.

Your petitioner also submits that the Seaboard Air Line case makes it clear that petitioner should receive the same "just compensation" whether suit is brought in the District Court, or the Court of Claims, that interest was awarded in the Court of Claims in the Brooks-Scanlon case (supra), which was a just compensation case, and your petitioner respectfully asks for a writ of certiorari on the ground that the decision in the case at bar, on the question of interest, is in direct conflict with those cases and also with United States v. Rogers, 255 U. S. 163, 169, and United States v. Benedict, 261 U. S. 294, 298.

[fol. f] The disallowance of interest means very heavy loss to your petitioner, but the proper decision of the constitutional question involved means far more to the Government. The people of the country believe in the Constitution and rely upon our Federal courts, in particular, to exercise scrupulous care in its construction and in the maintenance of its safeguards, and this Court will, it is believed, be quick to insist that, where "just compensation" is clearly due, payment must be made, not in part, but in full.

Wherefore, your petitioner prays that this Honorable Court will cause its writ of certiorari to be issued, requiring the Court of Claims of the United States to certify the whole record in this cause to it for review, so that this Court may act thereon as of right and according to law ought to be done.

Respectfully submitted.

Charles S. Haight, L. Russell Alden, Counsel for Petitioner.

[fol. 1] IN COURT OF CLAIMS OF THE UNITED STATES

No. C-1328

HOWARD PHELPS and CHARLES H. PHELPS, Copartners, Trading under the Firm Name and Style of Phelps Bros. & Co., Claimants,

against

UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed December 27, 1923

To the Honorable the Judges of the Court of Claims of the United States:

The claimants, Howard Phelps and Charles H. Phelps, for a first cause of action respectfully show as follows:

First. The claimants were at all the times hereinafter mentioned and now are co-partners trading under the firm name and style of Phelps Bros. & Co.; claimants and each of them were and are citizens of the United States, and their principal place of business was and is at No. 17 Battery Place, in the Borough of Manhattan, City, County and State of New York.

[fol. 2] Second. The United States is sued herein upon an implied contract under the general jurisdiction of this Court, conferred by Chapter 7, Section 145 of the Judicial Code of the United States.

Third. The claimants were at all the times hereinafter mentioned and now are the sole owners of an estate for years in that certain private dock or pier in New York Harbor in the County of Kings, State of New York, known and described as "Pier No. 7, Bush Terminal," together with the adjacent berths on the north and south sides thereof.

Fourth. The said estate for years was conveyed to and acquired by the claimants by a lease dated August 21, 1913, wherein and whereby the Bush Terminal Company, a New York corporation, the owners in fee of the said pier, did lease for the period of five years and six months from

April 1, 1914, at a reserved rental of sixty thousand dollars ($60,000) per year, payable in equal monthly instalments, the said pier and adjacent berths to the said claimants.

Fifth. The said lease contained an option of renewal for a further period of five years from October 1, 1919, which option was duly exercised by the claimants.

Sixth. The said pier at all the times herein mentioned was and now is twelve hundred and twenty-two (1222) feet long, on the south side, twelve hundred and nine (1209) feet long on the north side, and about one hundred and fifty (150) feet wide, and contains about one hundred and eighty-two thousand three hundred and twenty-five (182,325) square feet of space, one hundred and eighty-two thousand (182,000) square feet thereof being under shed.

Seventh. The claimants entered into possession and control of the said Pier 7 on or about April 1, 1914, and con- [fol. 3] tinued in full exclusive and peaceful possession and control of the said pier and the berths adjacent thereto from April 1, 1914, to December 31, 1917, and thereafter continued in actual physical possession of the outer half thereof until January 20, 1918, and of the inner half thereof until February 1, 1918. During the said periods, the claimants made all payments to Bush Terminal Company called for by said lease, and otherwise fully performed all of the obligations of the lessees in said lease.

Eighth. On or about December 31, 1917, a part of that certain private property, known and described as Bush Terminal, including the said Pier 7 and adjacent berths, was requisitioned by the President of the United States through an order of the Secretary of War, of which the following is a copy:

"War Department,
Washington, December 31, 1917.

To whom it may concern:

Pursuant to the authority vested in the President by the Act of Congress approved August 29, 1916, 39 Stat. 645, providing for possession and control of systems of transportation, and by section 10 of the Act of Congress ap-

proved August 10, 1917, Pub. No. 41, 65th Cong., authorizing the requisitioning of storage facilities for supplies connected with the common defense, possession, and control is hereby taken, by direction of the President, of the following described parts of a system of transportation, including storage facilities; that is to say, of those portions of the Bush Terminal docks and warehouse property described in Schedule 'A,' and shown on the map of Schedule 'B,' hereto annexed, in New York Harbor, to the end that they may be utilized to the exclusion of all other traffic, so far [fol. 4] as may be necessary, and for such time as may be required, for the transportation of troops, war material, and equipment, for the storage of military supplies, and for such other purposes connected with the emergency as may be needful or desirable. Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises, and also the fair compensation to be paid for the property in the event that the Government shall determine prior to July 1, 1918, to acquire absolute title thereto.

Done at the City of Washington this 31st day of December, 1917.

Newton D. Baker, Secretary of War."

Ninth. Under and pursuant to the said requisition order, the officer of the United States Army, in charge of the Division of Docks, Wharves and Terminals, duly served the following notice upon the claimants:

"Address reply to Gen'l Supt. A. T. Service, 104 Broad St., N. Y. C.

War Department, Office of the General Superintendent U. S. Army Transport Service, New York

Supervisor Docks, Wharves & Terminals

January 1, 1918.

Phelps Bros. Co., 17 Battery Place, N. Y. City:

Notice to Vacate

1. By authority of the President of the United States, the Bush Terminal has this day been requisitioned for the use

[fol. 5] of the Embarkation Service of the United States Army, and possession thereof has passed to the United States.

2. It is necessary that the Government have full benefit of these premises at the earliest possible date. It is desired, however, not to inconvenience the present occupants to the extent that may bring upon them any extensive financial losses. You will, therefore, immediately communicate with 1st Lieutenant H. S. Cole, U. S. A., Retired, Officer in Charge of the Division of Docks, Wharves and Terminals of this office, and make arrangements for the vacation of the premises now occupied by you.

3. Until further notice, all payments or any moneys due in respect of any period commencing on or after January 1st, 1918, will be made to the Bush Terminal Company for account of the United States.

By authority of the General Superintendent.
(Sgd.) Haydn S. Cole, 1st Lt., U. S. A., Officer in Charge of Div. of Docks, Wharves & Terminals.

KE/rr.

Tenth. Under and pursuant to the said requisition order, the Acting Quartermaster General of the United States Army duly served the following notice upon the Bush Terminal Company:

"War Department,
Washington, January 3, 1918.

In reply refer to 825.1-T (Bush Terminal).
From: Acting Quartermaster General.
To: Bush Terminal Company, 100 Broad Street, New York, N. Y.
Subject: Requisition of Bush Terminals.

1. Pursuant to the authority vested in the president by the Act of Congress approved August 29, 1916, 39 Stat. [fol. 6] 645, providing for possession and control of systems of transportation, and by section 10 of the Act of Congress approved August 10, 1917, Pub. No. 41, 65th Cong., authorizing the requisitioning of storage facilities, for sup-

plies connected with the common defense, possession and control is hereby taken, by direction of the President, of the following described parts of a system of transportation, including storage facilities; that is to say, of those portions of the Bush Terminal docks and warehouse property described in Schedule 'A,' and shown on the map on Schedule 'B,' on file in this office, in New York harbor, to the end that they may be utilized to the exclusion of all other traffic, so far as may be necessary, and for such time as may be required, for the transportation of troops, war material, and equipment, for the storage of military supplies, and for such other purposes connected with the emergency as may be needful or desirable. Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises, and also the fair compensation to be paid for the property in the event that the Government shall determine prior to July 1, 1918, to acquire absolute title thereto.

George W. Goethals, Acting Quartermaster General, by D. L. Brainard, Brigadier General, Quartermaster Corps, N. A."

BJB:mk.

Eleventh. Under and pursuant to the said requisition order, the United States took actual physical possession from the claimants, and the claimants surrendered actual physical possession to the United States of the outer half of the said pier on or about January 20, 1918, and of the inner half thereof on or about February 1, 1918.

[fol. 7] Twelfth. The United States continued in full possession and control of all of the said pier until on or about May 16, 1919, on or about which date possession and control of the said pier and of the said berths, excepting the outer north side berth, were restored to the claimants by the United States. The United States continued in possession and control of the said outer north side berth until on or about July 8, 1919, on or about which date possession and control of the said berth was restored to the claimants by the United States.

Thirteenth. The claimants were exclusively entitled to the possession and control of the said pier and adjacent

berths from on or about April 1, 1914, to on or about October 1, 1924, and to all of the benefits, privileges, rights and profits of their said leasehold estate and would have remained in possession and control and enjoyed the said benefits, privileges, rights and profits but for the said requisition.

Fourteenth. On December 31, 1917, and at all times thereafter up to and including the eighth day of July, 1919, the fair and reasonable value of the claimants' said leasehold estate and of possession and control of the said pier and said berths was in excess of one thousand dollars ($1,000) per day. The fair and reasonable value of the claimants' leasehold estate in and possession and control of the outer half of the said pier from January 20, 1918, to February 1, 1918, was in excess of seven hundred and fifty dollars ($750) per day. The fair and reasonable value of the claimants' leasehold estate in and possession and control of the said outer north side berth from May 15, 1919, to July 8, 1919, was in excess of three hundred and seventy-five dollars ($375) per day.

[fol. 8] Fifteenth. By reason of the said requisition the claimants were deprived of their leasehold estate, and of the rights and benefits incident thereto, in the said Pier 7, and of possession and control of said pier for a period of four hundred and sixty-nine (469) days; of their leasehold estate, and of the rights and benefits incident thereto, in the outer half of the said pier, and of possession and control of the said outer half for a further period of eleven (11) days; and of their leasehold estate, and of the rights and benefits incident thereto, in the said outer north side berth and of possession and control of said berth for a further period of fifty-three (53) days.

Sixteenth. The reasonable value of and just compensation for the claimants' said leasehold estate and possession and control of the said Pier 7 with adjacent berths for the said four hundred and sixty-nine (469) days is four hundred and sixty-nine thousand dollars (469,000) with interest. The reasonable value of and just compensation for the claimants' said leasehold estate in and possession and control of the outer half of the said Pier 7 with adjacent

berths for the said eleven (11) days is eight thousand two hundred and fifty dollars ($8,250) with interest. The reasonable value of and just compensation for the claimants' said leasehold estate in and possession and control of the said outer north side berth for the said fifty-three (53) days, is nineteen thousand eight hundred and seventy-five dollars ($19,875) with interest.

Seventeenth. On or about January 9, 1918, a Board of Appraisers was duly appointed by the Secretary of War of the United States to determine the rental value of the Bush Terminal, and on or about February 2, 1918, the said Board was further duly authorized and directed to determine the [fol. 9] value of the leasehold interest of each tenant of the said Bush Terminal Company and to arrange, if practicable, subject to approval, settlements with such tenants. True copies of said orders are hereto attached, made part hereof and marked Exhibits A and B, respectively.

Eighteenth. The said Board on or about May 20, 1919, offered to pay to the claimants a sum equivalent to payments made by them to the said Bush Terminal Company of instalments of rent (together with charges for electric light and water) due during the period of the said use and occupancy by the United States, and amounting in all to the sum of seventy-nine thousand eight hundred and ninety dollars and forty-two cents ($79,890.42), all without prejudice to the claimant's further claim for just compensation for the taking of its property as aforesaid.

Nineteenth. The United States paid to the claimants on or about the said February 20, 1920, the sum set forth in paragraph marked "Eighteenth" above (seventy-five thousand ($75,000) dollars rent and four thousand eight hundred ninety dollars and forty-two cents ($4,890.42) for electric light and water) and the claimants have accepted and received the same accordingly.

Twentieth. Under and pursuant to the said appointment and authority, the said Board on or about May 20, 1919, made an award to the claimants of compensation for the "use and occupancy of the premises so taken and occupied as aforesaid" of one thousand eight hundred and seventy-five dollars ($1,875) per month for the outer half of the

said pier and a like sum per month for the inner half thereof, both with interest. A true copy of the said award is hereto attached, made part hereof and marked Exhibit C.

[fol. 10] Twenty-first. Claimants on or about May 23, 1919, elected to and did reject the award set forth in paragraph marked "Twentieth" above and refused to accept the same in settlement or discharge of its claim for just compensation.

Twenty-second. The United States offered to pay and did pay to the claimants on or about February 20, 1920, seventy-five per centum of the said award as payment on account of their claim for just compensation, and the claimants have accepted and received the same accordingly, to wit: the sum of forty-four thousand seven hundred thirty-three dollars and seventy-nine cents ($44,733.79), all without prejudice to claimants' right to sue the United States to recover such further sum as added to said seventy-five per centum, will be just compensation.

Twenty-third. No part of the said sums of four hundred and sixty-nine thousand dollars ($469,000), eight thousand two hundred and fifty dollars ($8,250) and nineteen thousand eight hundred and seventy-five dollars ($19,875) mentioned in paragraph marked "Sixteenth" about has been paid to the claimants, although payment thereof has been duly demanded, except the sums of seventy-five thousand dollars ($75,000) and forty-four thousand seven hundred thirty-three dollars and seventy-nine cents ($44,733.79).

Twenty-fourth. By reason of the premises the United States became and now is indebted to the claimants in the sum of three hundred seventy-seven thousand three hundred ninety-one dollars and twenty-one cents ($377,391.21) with interest, and interest on the sums of seventy-five thousand dollars ($75,000) and forty-four thousand seven hundred thirty-three dollars and seventy-nine cents ($44,733.79) to February 20, 1920, which sums the United States has failed [fol. 11] and refused to pay and still fails and refuses to pay although due demand has been made therefor.

Twenty-fifth. No action has been had on the said claim in Congress or by any of the departments except as hereinabove set forth; the claimants are the sole owners of the

said claim and the only persons interested therein; no assignment or transfer of said claim or of any part thereof or interest therein has been made; the claimants are justly entitled to the amount herein claimed from the United States after allowing all just credits and off-sets; the claimants are citizens of the United States and have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government; and claimants believe the facts as stated in this petition to be true.

And for a second cause of action, claimants re-allege each and every allegation contained in paragraphs marked "First to Twenty-fourth" herein, inclusive, with the same force and effect as if herein specifically re-alleged, and further allege:

Twenty-sixth. At the time actual physical possession and control of the said pier was taken by the United States as hereinabove set forth, there were on the said piers certain gear, machinery and equipment, the property of the claimants.

Twenty-seventh. Possession and control of the said gear, machinery and equipment was taken by the United States at the time actual physical possession and control of the said pier was taken as hereinabove set forth.

Twenty-eighth. Possession and control of the said gear, machinery and equipment was taken by the United States [fol. 12] pursuant to the said requisition order hereinbefore alleged.

Twenty-ninth. The said gear, machinery and equipment has never been returned to the claimants although the claimants have duly demanded the same.

Thirtieth. The fair and reasonable value of the said gear, machinery and equipment when taken was and just compensation therefor is two thousand two hundred ninety-eight dollars and twenty-five cents ($2,298.25) with interest.

Thirty-first. No part of the said sum of two thousand two hundred ninety-eight dollars and twenty-five cents

($2,298.25) has been paid to the claimants although payment thereof has been duly demanded.

Thirty-second. No action has been had on the said claim in Congress or by any of the departments except as hereinabove set forth; the claimants are the sole owners of the said claim and the only persons interested therein; no assignment or transfer of said claim or of any part thereof or interest therein has been made; the claimants are justly entitled to the amount herein claimed from the United States after allowing all just credits and off-sets; the claimants are citizens of the United States and have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government; and claimants believe the facts as stated in this petition to be true.

Wherefore, claimants, your petitioners, pray judgment against the United States in the sum of three hundred seventy-seven thousand three hundred ninety-one dollars and twenty-one cents ($377,391.21) with interest to date of judgment and for interest on the sums of seventy-five thousand dollars ($75,000) and forty-four thousand seven [fol. 13] hundred thirty-three dollars and seventy-nine cents ($44,733.79) to February 20, 1920.

Phelps Bros. & Co., by Howard Phelps, Charles H. Phelps. L. Russell Alden, Attorney for Claimants, Union Trust Building, Washington, D. C. Haight, Smith, Griffin & Deming, of Counsel, 27 William Street, New York City.

*Duly sworn to by Howard Phelps and Charles H. Phelps. Jurat omitted in printing.*

[fol. 14] EXHIBIT A TO PETITION

A. G. 334.7, Inspection and Appraisement

January 9, 1918.

From: The Adjutant General of the Army.
To: Mr. J. Spencer Smith, care of the Acting Quarter-Master General.
Subject: Appointment of Board.

1. A board, to consist of Mr. J. Spencer Smith, Mr. Edward M. Bassett, Mr. John H. Gray, Mr. John H. Roemer, Major John S. Dean, Judge Advocate General's Reserve Corps, is hereby appointed to meet at such time and place as may be indicated by the Acting Quartermaster General of the Army, for the purpose of determining the rental value of the Bush Terminal, commandeered on January 1, 1917.

2. Such journeys as may be required of Major Dean under this order are necessary in the military service.

By order of the Secretary of War.
(Signed) A. G. Lott, Adjutant General.

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[fol. 15] EXHIBIT B TO PETITION

A. G. 334-7, Bush Terminal, (Off. #58 ejb/bdh)

War Department, the Adjutant General's Office,
Washington

February 2, 1918.

From: The Adjutant General of the Army.
To: The Senior Member of Board appointed to determine the rental value of the Bush Terminal, through the Acting Quartermaster General, Washington, D. C.
Subject: Appraisement of the Bush Terminals, requisitioned January 1, 1918.

1. In addition to determining the rental value of the Bush Terminal, the Board appointed January 9, 1918, by the Secretary of War for the purpose of determining the rental

value of the Bush Terminal, requisitioned January 1, 1918, is hereby authorized and directed to ascertain and report what would constitute a fair compensation to be paid for the property, in the event the Government shall determine prior to July 1, 1918, to acquire absolute title to the property.

2. The said board is further authorized and directed to determine the value of the leasehold interest of each tenant of the said Terminal Company, and arrange if practicable, subject to approval, settlements with such tenants.

3. Said Board is further authorized and instructed to investigate and to make recommendations as to which of the twenty-six manufacturing tenants, if any now occupying space in the warehouses of the said Terminal Company, should be permitted to retain such space until the end of their leases; such recommendation to be submitted to the proper authority at the earliest possible time.

By order of the Secretary of War.
(Signed) Geo. C. Hicks, Jr., Adjutant General.

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[fol. 16] EXHIBIT C TO PETITION

Award to Phelps Bros. & Company, Pier 7 (A. B. C. D.)

We, the undersigned, a Board of Appraisers, appointed pursuant to the authority vested in the President of the United States by Act of Congress approved August 29, 1916 (39 Stat. 645), providing for the possession and control of systems of transportation and by Section 10 of Act of Congress, approved August 10, 1917 (Pub. No. 41, 65 Cong.) authorizing the requisitioning of storage facilities for supplies connected with the common defense, for the purpose of ascertaining the just compensation to be paid by the United States for the temporary use and occupancy, injury, destruction or purchase of that portion of the property belonging to Bush Terminal (Lessor), Phelps Bros. & Company, Pier 7 (A. B. C. D.) (Lessee), situated in the City of Brooklyn, County of Queens, State of New York, more particularly described as Pier 7 (A. B. C. D.), as

shown on the map and plat of the Bush Terminal filed with the Report of the Board of Appraisers, marked "Schedule B," having heard the proofs and allegations of the parties and examined the matters submitted by them, do report and award as follows, namely:

1. That the United States did requisition the temporary use and occupancy of the premises known as Pier 7, (A. B. C. D.) as shown on the map and plat of the Bush Terminal, filed with the Report of the Board of Appraisers marked "Schedule B," from the third day of January, 1918, and still occupies the same; that the just compensation for the use and occupancy of the premises so taken and occupied as aforesaid is the sum of $8,750.00 per month, of which said monthly sum the aforesaid Lessee, Phelps Bros. & Company, is entitled to receive $1,875 per month for the [fol. 17] portion of said pier known as A. B. from the twentieth day of January, 1918, the date possession of same was surrendered, and $1,875.00 per month for the portion of said pier known as C. D. from the second day of February, 1918, the date possession of same was surrendered, in all $3,750.00 per month for said entire pier and aggregating including principal and interest to February 1, 1919—the sum of $46,701.50 that just compensation for such use and occupancy by the United States so long as the same shall continue after the first day of February, 1919, is the sum of $8,750.00 per month, payable on the first day of each succeeding month, of which said monthly payment the said Lessee, Phelps Bros. & Company, is entitled to receive $3,750.00 per month to and including the payment to be made on the first day of October, 1919, and no longer. Award is accordingly made to said Lessee.

2. During such period as the United States shall continue to use or occupy said premises after February 1, 1919, and before October 1, 1919, just compensation to the Lessee is as follows: for Pier No. 7 (A. B. C. D.)—$3,750.00 per month.

3. Total of just compensation hereby awarded and to be paid the Lessee February 1, 1919, is $46,701.50.

In witness whereof, we have hereunto set our hands and seals this 20th day of May, 1919.

J. Spencer Smith (L. S.), Chairman. John S. Dean (L. S.), Lt. Col. J. A. U. S. A. Edward M. Bassett (L. S.)

[fol. 18] Phelps Bros. Company

A. B.

Pier 7—(C. D.)

| | |
|---|---|
| Value of space per month | 8,750 00 |
| Rent reserved per month | 5,000 00 |
| Amount due tenant per month over rent reserved | 3,750 00 |
| Amount due tenant per month for "A. B." | $1,875 00 |
| Amount due tenant per month for "C. D." | 1,875 00 |

Occupation of "A. B." began January 20, 1918.
" " "C. D." " February 2, 1918.

Lease expires October 1, 1919.

| Monthly rental | | Interest to Feb. 1, 1919 | Total due Feb. 1, 1919 |
|---|---|---|---|
| Jany. (11 days) A. B. | $687 50 | $41 25 | |
| Feby. A. B. | 1,875 00 | 191 50 | |
| Feby. (26 Days) C. D. | 1,625 00 | | |
| March (A. B. & C. D.) | 3,750 00 | | |
| April | 3,750 00 | | |
| May | 3,750 00 | | |
| June | 3,750 00 | | |
| July | 3,750 00 | | |
| August | 3,750 00 | 1,031 25 | |
| Sept. | 3,750 00 | | |
| Oct. | 3,750 00 | | |
| Nov. | 3,750 00 | | |
| Dec. | 3,750 00 | | |
| Jany. | 3,750 00 | | |
| | $45,437 50 | $1,264 00 | |
| | | $45,437 50 | $46,701 50 |

We, the undersigned, hereby accept the above award in full payment and discharge of all debts, demands and claims whatsoever against the United States, arising or to arise for or by reason of any use, occupancy, destruction, injury or purchase of any or all of the property, rights or interests more particularly described in the above award or the schedule attached thereto.

[fol. 19] In witness whereof, we have hereunto set our hands and seals this — day of ——, 1919.

—— ——. (L. S.) —— ——. (L. S.)

Address: ——.

Witness: —— ——.

We, the undersigned, are not satisfied with the above award and schedule attached hereto. We desire to be paid 75 per centum of the amount of the award, reserving to ourselves, our successors, heirs, executors, administrators and assigns, the right to sue the United States to recover such further sums as added to said 75 per centum will make up such amount as will be just compensation, for the use, occupancy, destruction, injury or purchase of any or all of the property, rights, or interests, more particularly described in above award or the schedule attached thereto.

In witness whereof, we have hereunto set our hands and seals this — day of ——, 1919.

—— ——. (L. S.) —— ——. (L. S.)

Address: ——.

Witness: —— ——.

---

[fol. 20] II. General Traverse—Feb. 26, 1924

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Motion Suggesting Death of Howard Phelps—Filed May 18, 1925

On May 18, 1925, the plaintiff filed a motion suggesting the death of Howard Phelps, one of the partners, and asked leave to proceed in the name of Charles H. Phelps, surviving partner.

Said motion was allowed by the court on May 20, 1925.

---

IV. Submission of Case

On February 17, 1926, this case was submitted on merits, on stipulation of parties, without argument, by L. Russell Alden, Esq., for plaintiff, and by Assistant Attorney General Galloway and Howard W. Ameli, Esq., for defendant.

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[fol. 21] V. **Special Findings of Fact and Conclusion of Law**—March 8, 1926

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Special Findings of Fact

I

The plaintiffs, Howard Phelps and Charles H. Phelps, were at the time of the filing of the petition herein and at all the times therein mentioned, copartners trading under the firm name and style of Phelps Bros. & Co., and were citizens of the United States, and at the time of the filing of the petition herein, residents of the city of New York; their principal place of business was at No. 17 Battery Place, Borough of Manhattan, New York City.

II

The plaintiff Howard Phelps died on November 1, 1924, and the plaintiff Charles H. Phelps is the surviving partner of the said firm of Phelps Bros. & Co.

On May 20, 1925, the death of Howard Phelps was suggested, and prosecution of this action in the name of Charles H. Phelps as surviving partner was authorized.

III

The plaintiffs were at the time of the filing of the petition herein, and at all the times therein mentioned, the sole owners of that certain lease made by the Bush Terminal Co. to Phelps Bros. & Co., dated August 21, 1913, wherein and whereby said Bush Terminal Co. did lease for a period of five years and six month from April 1, 1914, at a reserved rental of $60,000 a year, payable monthly, that certain private dock or pier in New York Harbor known as "Pier No. 7, Bush Terminal," together with the berths on the north and south sides thereof.

[fol. 22]

IV

The said Pier 7 was and is 1,222 feet long on the south side, 1,209 feet long on the north side, and about 157 feet wide, and of about 178,500 square feet of space under shed. The said pier was and is what is known as a four-berth pier, that is to say, it was and is capable of accommodating simultaneously four vessels of the usual type and size and their cargo while loading and discharging.

V

From the inception of the said leasehold to the time that the same was requisitioned, as hereinafter stated, the plaintiffs complied with all the terms of the said lease and were in peaceful possession thereunder of the said pier.

VI

The said lease contained an option of renewal for a further period of five years from October 1, 1919, upon notice in writing to the lessor at least one year prior to October 1, 1919, and the plaintiffs prior to October 1, 1918, exercised the said option.

VII

On December 31, 1917, the Secretary of War, by direction of the President of the United States, duly issued the following general order:

War Department,
Washington, December 31, 1917.

To whom it may concern:

Pursuant to the authority vested in the President by the act of Congress approved August 29, 1916, 39 Stat. 645, providing for possession and control of systems of transportation, and by section 10 of the act of Congress approved August 10, 1917, Pub. No. 41, 65th Cong., authorizing the requisitioning of storage facilities for supplies connected with the common defense, possession, and control is hereby taken, by direction of the President, of the following described parts of a system of transportation, including storage facilities; that is to say, of those portions of the Bush Terminal docks and warehouse property described in Schedule "A," and shown on the map of Schedule "B," hereto annexed, in New York Harbor, to the end that they may be utilized to the exclusion of all other traffic, so far as may be necessary, and for such time as may be required, for the transportation of troops, war material, and equipment, for the storage of military supplies, and for such other purposes connected with the emergency as may be needful or desirable. Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises, and also the fair compensation to be paid for the property in the event that the Government shall determine prior to July 1, 1918, to acquire absolute title thereto.

Done at the City of Washington this 31st day of December, 1917.

Newton D. Baker, Secretary of War.

[fol. 23] VIII

On the same date under authority of the above order, Maj. Gen. George W. Goethals, acting quartermaster general of the United States Army, addressed to Maj. Gen. David C. Shanks, general superintendent of Army Transport Service, the following telegram, which was duly received by the latter:

[Telegram]

December 31, 1917.

Major General David C. Shanks, General Superintendent
Army Transport Service, New York, N. Y.:

An order has been issued by the President this date for taking possession and assuming control of those portions of the Bush Terminal docks and warehouse property known to you and described in Schedule "A" and shown on the map on Schedule "B" attached thereto. In conformity with said order you will take possession and assume control of the premises from this date.

Goethals, Acting Quartermaster General.

(825.1-T Bush Terminal L.)

IX

Thereafter there was duly served upon the plaintiffs on behalf and by the authority of the said general superintendent of Army Transport Service the following communication, together with a copy of the general order of the Secretary of War set forth in Finding VII:

Address reply to Gen'l Supt. A. T. Service, 104 Broad St., N. Y. C.

War Department, Office of the General Superintendent,
U. S. Army Transport Service, New York

January 1, 1918.

(H. S. C.)

Supervisor Docks, Wharves & Terminals, Phelps Bros. Co.,
17 Battery Place, N. Y. City:

Notice to Vacate

1. By authority of the President of the United States, the Bush Terminal has this day been requisitioned for the use of the Embarkation Service of the United States Army, and possession thereof has passed to the United States.

2. It is necessary that the Government have full benefit of these premises at the earliest possible date. It is desired, however, not to inconvenience the present occupants to the extent that may bring upon them any extensive financial losses. You will therefore immediately communicate with 1st Lieutenant H. S. Cole, U. S. A., Retired, Officer in Charge of the Division of Docks, Wharves and Terminals [fol. 24] of this office, and make arrangements for the vacation of the premises now occupied by you.

3. Until further notice, all payments or any moneys due in respect of any period commencing on or after January 1st, 1918, will be made to the Bush Terminal Company for account of the United States.

By authority of the General Superintendent.
(Sgd.) Haydn S. Cole, 1st Lt. U. S. A., Officer in Charge of Div. of Docks, Wharves & Terminals.

KE rr.

X

Upon receipt of the said communication set forth in Finding IX the plaintiffs had a number of verbal and written communications with the office of the general superintendent of Army Transport Service in New York, which resulted in the turning over to the United States of physical possession of the outer half of said pier on January 20, 1918, and of the inner half of said pier on February 2, 1918. Under and pursuant to the said order set forth in Finding VII the United States took from the plaintiffs the use and occupancy of the said Pier No. 7 on January 20, 1918, with respect to the outer half thereof, and on February 2, 1918, with respect to the inner half thereof.

XI

The United States continued in the full use, occupation, enjoyment, management, and possession of the said pier and the said berths until midnight of May 14, 1919, on which date possession of the said pier and of all the said berths was restored to the plaintiffs.

XII

The plaintiffs continued, after December 31, 1917, to pay monthly to Bush Terminal Co., the lessor, the rent reserved in their lease of the said pier through and including the month of April, 1919.

XIII

On January 9, 1918, the following order was duly issued by order of the Secretary of War:

A. G. 334.7, Inspection and Appraisement

January 9, 1918.

From: The Adjutant General of the Army.

To: Mr. J. Spencer Smith, care of the Acting Quartermaster General.

Subject: Appointment of board.

1. A board to consist of: Mr. J. Spencer Smith, Mr. Edward M. Bassett, Mr. John H. Gray, Mr. John H. Roemer, Major John S. Dean, Judge Advocate General's Reserve [fol. 25] Corps, is hereby appointed to meet at such time and place as may be indicated by the Acting Quartermaster General of the Army, for the purpose of determining the rental value of the Bush Terminal, commandeered on January 1, 1917.

2. Such journeys as may be required of Major Dean under this order are necessary in the military service.

By order of the Secretary of War:

(Signed) A. G. Lott, Adjutant General.

XIV

The date in the body of the said order of January 9, 1918, reading January 1, 1917, was a typographical error and should read January 1, 1918.

XV

On February 2, 1918, the following order was duly issued by order of the Secretary of War:

A. G. 334-7, Bush Terminal (Off. #68 ejb/bdh)

War Department, The Adjutant General's Office, Washington

February 2, 1918.

From: The Adjutant General of the Army.

To: The Senior Member of Board appointed to determine the rental value of the Bush Terminal, through the Acting Quartermaster General, Washington, D. C.

Subject: Appraisement of the Bush Terminal, requisitioned January 1, 1918.

1. In addition to determining the rental value of the Bush Terminal, the Board appointed January 9, 1918, by the Secretary of War for the purpose of determining the rental value of the Bush Terminal, requisitioned January 1, 1918, is hereby authorized and directed to ascertain and report what would constitute a fair compensation to be paid for the property, in the event the Government shall determine prior to January 1, 1918, to acquire absolute title to the property.

2. The said board is further authorized and directed to determine the value of the leasehold interest of each tenant of the said Terminal Company, and arrange if practicable, subject to the approval, settlements with such tenants.

3. Said Board is further authorized and instructed to investigate and to make recommendations as to which of the twenty-six manufacturing tenants, if any now occupying space in the warehouses of the said Terminal Company, should be permitted to retain such space until the end of their leases, such recommendation to be submitted to the proper authority at the earliest possible time.

By order of the Secretary of War:

(Signed) Geo. C. Hicks, Jr., Adjutant General.

[fol. 26] XVI

On or about May 20, 1919, the said board of appraisers appointed by the said orders made two awards to the plaintiffs, as follows:

Award to Phelps Bros. & Company, Pier 7 (A. B. C. D.)

We, the undersigned, a Board of Appraisers, appointed pursuant to the authority vested in the President of the United States by Act of Congress approved August 29, 1916, (39 Stat. 645), providing for the possession and control of systems of transportation and by Section 10 of Act of Congress, approved August 10, 1917 (Pub. No. 41, 65 Cong.), authorizing the requisitioning of storage facilities for supplies connected with the common defense, for the purpose of ascertaining the just compensation to be paid by the United States for the temporary use and occupancy, injury, destruction or purchase of that portion of the property belonging to Bush Terminal (Lessor), Phelps Bros. & Company, Pier 7 (A. B. C. D.) (Lessee), situated in the City of Brooklyn, County of Queens, State of New York, more particularly described as Pier #7 (A, B, C, D) as shown on the map and plat of the Bush Terminal filed with the Report of the Board of Appraisers, marked "Schedule B," having heard the proofs and allegations of the parties and examined the matters submitted by them, do report and award as follows, namely:

1. That the United States did requisition the temporary use and occupancy of the premises known as Pier 7 (A. B. C. D.), as shown on the map and plat of the Bush Terminal, filed with the Report of the Board of Appraisers, marked "Schedule B," from the third day of January, 1918, and still occupies the same; that the just compensation for the use and occupancy of the premises so taken and occupied as aforesaid is the sum of $8,750.00 per month, of which said monthly sum the aforesaid lessee Phelps Bros. & Company is entitled to receive $1,875 per month for the portion of said pier known as A. B. from the twentieth day of January, 1918, the date possession of same was surrendered, and $1,875.00 per month for the portion of said pier known as C. D. from the second day of February, 1918, the date possession of same was surrendered, in all $3,750.00 per month for said entire pier and aggregating, including principal and interest to February 1, 1919, the sum of $46,701.50; that just compensation for such use and occupancy by the United States so long as the same shall continue after the first day of February 1919 is the sum of $8,750.00 per

month, payable on the first day of each succeeding month, of which said monthly payment the said lessee Phelps Bros. & Company is entitled to receive $3,750.00 per month to and including the payment to be made on the first day of October, 1919, and no longer. Award is accordingly made to said Lessee.

2. During such period as the United States shall continue to use or occupy said premises after February 1, 1919, and before October 1, 1919, just compensation to the lessee is as follows:

For Pier No. 7 (A. B. C. D.), $3,750.00 per month.

3. Total of just compensation hereby awarded and to be paid the lessee February 1, 1819, is $46,701.50.

[fol. 27] In witness whereof we have hereunto set our hands and seals this 20th day of May, 1919.

J. Spencer Smith, Chairman. (L. S.) John S. Dean, Lt. Col. J. A., U. S. A. (L. S.) Edward M. Bassett. (L. S.)

Phelps Bros. & Co.

Pier 7 (A. B., C. D.)

| | |
|---|---|
| Value of space per month | $8,750 00 |
| Rent reserved per month | 5,000 00 |
| Amount due tenant per month over rent reserved | 3,750 00 |
| Amount due tenant per month for "A, B" | $1,875 00 |
| Amount due tenant per month for "C, D" | 1,875 00 |

Occupation of A. B. began January 20, 1918.
Occupation of C. D. began February 2, 1918.
Lease expires October 1, 1919.

| Monthly rental | | Interest due Feb. 1, 1919 | Total due Feb. 1, 1919 |
|---|---|---|---|
| January (11 days) A. B | $687 50 | $41 25 | |
| February (A. B.) | 1,875 00 | 191 50 | |
| February (26 days) C. D. | 1,625 00 | | |
| March (A. B. and C. D) | 3,750 00 | | |
| April | 3,750 00 | | |
| May | 3,750 00 | | |
| June | 3,750 00 | | |
| July | 3,750 00 | | |
| August | 3,750 00 | 1,031 35 | |
| September | 3,750 00 | | |
| October | 3,750 00 | | |
| November | 3,750 00 | | |
| December | 3,750 00 | | |
| January | 3,750 00 | | |
| | 45,437 50 | 1,264 00 | |
| | | 45,437 50 | |
| | | | $46,701 50 |

We, the undersigned, hereby accept the above award in full payment and discharge of all debts, demands, and claims whatsoever against the United States, arising or to arise for or by reason of any use, occupancy, destruction, injury, or purchase of any or all of the property, rights or interests more particularly described in the above award or the schedule attached thereto.

In witness whereof we have hereunto set our hands and seals this — day of ——, 1919.

—— ——. (L. S.) —— ——. (L. S.)

Address: —— ——.

Witness: —— ——.

We, the undersigned, are not satisfied with the above award and schedule attached thereto. We desire to be paid 75 per centum of the amount of the award, reserving to our-[fol. 28] selves, our successors, heirs, executors, administrators, and assigns, the right to sue the United States to recover such further sums as added to said 75 per centum will make up such amount as will be just compensation, for

the use, occupancy, destruction, injury, or purchase of any or all of the property, rights, or interests, more particularly described in above award or the schedule attached thereto.

In witness whereof we have hereunto set our hands and seals this 23rd day of May, 1919.

Phelps Bros. & Co. Howard Phelps. (L. S.) Chas. H. Phelps. (L. S.)

Address: 17 Battery Place, New York City.

Witness: Edward Sandford.

Additional Award to Phelps Bros. & Co.

We, the undersigned, a board of appraisers, appointed pursuant to the authority vested in the President of the United States by act of Congress approved August 29, 1916 (39 Stat. 645), providing for the possession and control of systems of transportation and by section 10 of act of Congress approved August 10, 1917 (Pub. No. 41, 65 Cong.) authorizing the requisitioning of storage facilities for supplies connected with the common defense, for the purpose of ascertaining the just compensation to be paid by the United States for the temporary use and occupancy, injury, destruction or purchase of that portion of the property belonging to the Bush Terminal (lessor), Phelps Bros. & Co. (lessee), situate at Brooklyn, Queens County, State of New York, more particularly described as Section A. B. and C. D. of Pier No. 7, as shown on the map and plat of the Bush Terminal (Schedule B), filed with the report of the board of appraisers, having heard the proofs and allegations of the claimant and examined the matters submitted by it, do report and award as follows:

1. That the United States did requisition the temporary use and occupancy of the premises known as Sections A. B. and C. D. on Pier No. 7, as shown on the map and plat of the Bush Terminal, filed with the report of the board of appraisers, marked "Schedule B," from the third day of January, 1918, and still occupies the same. That the said premises known as A. B. were vacated on January 20, 1918, and the premises known as C. D. were vacated February 2, 1918 by Phelps Bros. & Co., and that just compensation for

the use and occupancy of the said premises has heretofore been awarded to the said Phelps Bros. & Co. therefor. That after vacating the said premises on the dates aforesaid, Phelps Bros. & Co. continued to make payment to the Bush Terminal of the rent reserved in its original lease as follows:

| | |
|---|---|
| For January, 1918 | $877 92 |
| For February, 1918 | 5,267 50 |
| For March, 1918 | 5,267 50 |
| For April, 1918 | 5,267 50 |
| For May, 1918 | 5,267 50 |
| For June, 1918 | 5,267 50 |
| For July, 1918 | 5,267 50 |
| For August, 1918 | 5,267 50 |
| For September, 1918 | 5,267 50 |
| For October, 1918 | 5,267 50 |
| [fol. 29] For November, 1918 | 5,267 50 |
| For December, 1918 | 5,267 50 |
| For January, 1919 | 5,267 50 |
| For February, 1919 | 5,267 50 |
| For March, 1919 | 5,267 50 |
| For April, 1919 | 5,267 50 |
| Total | $79,890 42 |

which said payments were made to the Bush Terminal under the misapprehension that the same were necessary to protect the lease of Phelps Bros. & Co. from forfeiture, and that the said sums, aggregating $79,890.42, collected by the Bush Terminal, were credited to and accounted for to the Government by the Bush Terminal, and should therefore be returned to Phelps Bros. & Co. No interest should be allowed on said payments, as the same were voluntarily made by Phelps Bros. & Co. and not required of it by the Government.

2. Award is accordingly made to Phelps Bros. & Co. for the sum of $79,890.42, covering said payments.

In witness whereof we have hereunto set our hands and seals this 20th day of May, 1919.

J. Spencer Smith, Chairman, [L. S.] John S. Dean, Lt. Col. J. A., U. S. A. [L. S.] Edward M. Bassett. [L. S.]

The above award approved and payment in full directed this — day of ——, 1919.

For the Secretary of War:

Herbert H. Lehman, Lieutenant Colonel, General Staff, Assistant Director of Purchase, Stge., and Traffic.

The above award approved and payment of 75 per cent thereof directed this — day of ——, 1919.

For the Secretary of War:

Herbert H. Lehman, Lieutenant Colonel, General Staff, Assistant Director of Purchase, Stge., and Traffic.

We, the undersigned, hereby accept the above award, in full payment and discharge of all debts, demands and claims whatsoever against the United States, arising or to arise for or by reason of the payment by us of rent to Bush Terminal, on any and all property or rights of us, said Phelps Bros. & Co., in the premises of the Bush Terminal, known as Pier 7, to and including April 30, 1919, as requisitioned January 3, 1918, more particularly described in the above award or the schedule attached thereto.

In witness whereof we have hereunto set our hands and seals this 23d days of May, 1919.

Phelps Bros. & Co. Howard Phelps. [L. S.]
Chas. H. Phelps. [L. S.]

Address: 17 Battery Place, New York City.

Witness: Edward Sanford.

[fol. 30]

## XVII

The plaintiffs in accordance with the terms of the said first award, elected to accept 75 per cent of the amount thereof, and noted such election upon the said award in the space provided therefor, as shown by the copy thereof set forth in Finding XVI, and on February 20, 1920, received payment from the United States of the said 75 per cent of the said award plus 75 per cent of the amount necessary to bring the award up to May 14, 1919, the payment totaling $44,733.79.

XVIII

The plaintiffs in accordance with the terms of the said additional award, accepted the same, noted such acceptance upon the said award in the space provided therefor as shown by the copy thereof set forth in Finding XVI, and on or about February 20, 1920, received payment from the United States of the amount thereof, to wit, the sum of $79,890.42.

XIX

During the years 1918 and 1919, as a result of war conditions, the value of all available steamers was very high and a steamer lying in the open harbor at New York in consequence of not being able to obtain a berth was losing thousands of dollars every day.

XX

Two hundred and fifty to six hundred dollars per day were readily offered for a berth for a steamer in the said years.

XXI

The Bush Terminal piers were in 1918 and 1919 among the best and most valuable piers in the port of New York. They were well constructed and of ample width for the handling of any large amount of cargo, with the exception of Pier 8, leased to A. W. Duckett & Co. With the exception of Pier 8, steamers could be berthed on both sides simultaneously, thus facilitating the transshipment of freight from one steamer to another. The slips alongside of the piers were wide, and were dredged sufficiently to accommodate or to float any of the large ocean-going steamers. At the head of the slips was a large open space, commonly known as the "farm," which was used for the accumulation and storing of cargo. The piers were shedded for almost the entire floor area, the sheds were specially designed for the rapid handling of cargo in and out of steamers. There was an elaborate and well-run railroad system connected with all the piers except Pier 8. The rails ran almost the full length of the piers, were connected with the other piers, ran to large and commodious ware-

houses and manufacturing plants at the rear of the property, and connected with all the main trunk-line railroads having their terminals in the port of New York. Pier 8 did not have any railroad tracks on it or rail connections with it.

[fol. 31]

XXII

From November 1, 1917, until actual physical possession of Pier 7 was taken over by the United States, the plaintiffs received from the United States Shipping Board $500 per day for the use of the outer half of the said pier and from the Panama Railroad Steamship Company, owned by the United States, for the inner half $400 per day, or a total of $900 per day.

XXIII

After the return of the pier to the plaintiffs in 1919 they received for the rental of berths at the pier during the remainder of that year an average of $1,103 per day during June and July, $1,179 per day during August, $1,020 per day during September, $1,074 per day during October, $1,170 per day during November, and $1,222 per day during December.

XXIV

The United States requisitioned from Booth & Co., Inc., at the same time that it requisitioned Pier 7, the use and occupation of Section D of Pier 4, Bush Terminal. Thereafter, on or about May 18, 1918, the United States licensed the use of the said Section D of Pier 4 to Booth & Co., Inc., from the said date until and including April 30, 1919, at the rate of $250 per day per berth, and Booth & Co., Inc., paid to the United States for said use under the said license the sum of $95,066.31.

XXV

During the time that the United States was in possession and control of Pier 7 it rented a berth at the said pier to the plaintiffs at the rate of $300 per day.

XXVI

The reasonable value of the use of the outer half of said Pier 7 from January 20, 1918, to February 1, 1918, both inclusive, a period of 13 days, was $400 per day, a total of $5,200. The reasonable value of the use of said Pier 7 from February 2, 1918, to May 14, 1919, both inclusive, a period of 467 days, was $800 per day, a total of $373,600, in all $378,800. Just compensation to plaintiffs for the use of said pier is said sum of $378,800 less rents in the sum of $79,890.42, reimbursed by the United States (Finding XVIII), viz, $298,909.58. Plaintiff was paid $44,733.79, leaving unpaid $254,175.79.

XXVII

At the time physical possession of the pier was taken over by the United States there were on the pier certain gear machinery, and equipment belonging to the plaintiffs, which the United States took possession and control of at the same time.

[fol. 32] XXVIII

The reasonable value of the said gear, machinery, and equipment at the time of its taking by the United States was $2,298.

None of the said gear, machinery, and equipment has ever been returned to the plaintiffs except 18 blocks, 3 part coils wire rope, and 2 hatch tents.

The reasonable value of the said 18 blocks, 3 parts coils wire rope and 2 hatch tents was $490.

Conclusion of Law

On the facts found, which are made a part of the judgment herein, the court concludes as matter of law that Charles H. Phelps as surviving partner of Phelps Bros. & Co. is entitled to recover $254,175.79 under Finding XXVI, and $1,808 under Finding XXVIII, in all the sum of $255,983.79.

It is therefore adjudged and ordered that Charles H. Phelps, as surviving partner of Phelps Bros. & Co., do have and recover of and from the United States the sum of two

hundred fifty-five thousand nine hundred eighty-three dollars and seventy-nine cents ($255,983.79).

See opinion in case No. C1326, Booth & Co. v. The United States, this day decided.

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[fol. 33] VI. Opinion of the Court by Downey, J., in Case of Booth & Co. v. U. S., No. C-1326, Referred to on p. 32

Downey, Judge, delivered the opinion of the court:

The right of the plaintiff to recover is determined by the Duckett case, 266 U. S. 149. The amount of the recovery allowed is in accordance with the facts found in Finding XXV. The plaintiff asks interest, which we have not awarded and the reason for this action should be stated. It is to be found in the distinction to be drawn between the Seaboard case, 261 U. S. 299, and the Brooks-Scanlon case, 265 U. S. 106, on the one hand, and the Duckett case, supra, on the other.

In the Seaboard case, which was a Lever Act case, it is said "the owner's right does not depend on contract, express or implied," and the suit is said to be "a part of the authorized procedure initiated by the United States for the condemnation of the land." The North American Transportation & Trading Co. case, 253 U. S. 330, is distinguished by the statement that that case "was a suit in the Court of Claims based on an implied promise of the United States to pay for property appropriated by it. It was not a condemnation case." The Brooks-Scanlon case arose out of the exercise of a power under the act of June 15, 1917, 40 Stat. 182, which not only conferred the power but prescribed a procedure of which the suit in this court was a part, as in the Seaboard case, except that the jurisdiction in that case was in the District Court.

In the Duckett case the procedure was under a provision contained in the Army appropriation act of August 29, 1916, 39 Stat. 619 at 645, which conferred a power but provided no procedure as to the ascertainment of compensation. That a board was appointed without authority of the act to award compensation can not affect the legal status of the claim for the right to compensation is not derived from the

act. The Supreme Court says that "The claim is based upon an implied contract alleged to have arisen from a taking for war purposes"; in concluding it is said that "Whatever the effect of the taking, there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims," citing the North American Transportation and Trading Co. case which was distinguished in the Seaboard case.

What is said in the Seaboard case as to the measure of just compensation might justify the inclusion of interest as a part of the award in this case were it not for section 177 of the Judicial Code, which is applicable because jurisdiction in this case is upon the implied contract arising out of the taking, together with the provisions of the fifth amendment. The history of section 177, and its effect are reviewed in the opinion of the Chief Justice in case No. D-549, Liggett & Myers Tobacco Company v. The United States, decided by this court on February 15, 1926, to which reference is made.

Graham, Judge; Hay, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

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[fol. 34] VII. JUDGMENT

At a Court of Claims held in the City of Washington on the 8th. day of March, 1926, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the plaintiffs, and do order and adjudge that the plaintiffs, as aforesaid, are entitled to recover and shall have and recover of and from the United States the sum of Two hundred and fifty-five thousand nine hundred and eighty-three dollars and seventy-nine cents ($255,983.79).

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VIII. MOTION FOR A NEW TRIAL

Now come the claimants and move for a new trial herein upon the ground of error of law in that the court erred in not allowing interest on the judgment of the court for the claimants herein.

Claimants ask that this motion be set down for oral argument at an early date, preceding the action of the court on the motion for new trial presented by defendants under Section 173 of the Judicial Code in the case of A. W. Duckett & Co., Inc., No. 34,218, the question involved herein being similar to one of the questions involved in that motion. If said motion in the Duckett case is set down for oral argument, claimants ask that this motion be set down for argument with the motion in that case.

Claimants also suggest to this court the certification of the question of interest arising both in this case and in the Duckett case under Section 3, paragraph (a), of the act of February 13, 1925.

An identical motion has also been filed in the case of Booth & Company, Inc., a corporation, No. C-1326.

L. Russell Alden, Attorney for Claimant. Charles S. Haight, Counsel.

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ARGUMENT AND SUBMISSION

On May 3, 1926, the above motion was argued and submitted by Mr. Harold S. Deming, for plaintiff, and by Mr. Assistant Attorney General Galloway, for the defendant.

[fol. 35] IX. Opinion Overruling Motion for a New Trial—May 24, 1926

No. C-1326

Booth & Company, Inc.,

v.

The United States

No. C-1328

Howard Phelps and Charles H. Phelps, Copartners, Trading under the firm name and style of Phelps Bros. & Co.,

v.

The United States

(Decided May 24, 1926)

Campbell, Chief Justice, delivered the opinion of the court:

A judgment was rendered in each of these cases for the value of the property at the time it was taken by the Government. The plaintiffs' motions for a new trial are based upon the ground that the "court erred in not allowing interest on the judgment." At their request plaintiffs' attorneys have been heard in argument upon the question whether interest was allowable on the ascertained value of the property from the time of its taking. The property was a part of that coming within the general designation of the Bush Terminals in New York, and it is alleged to have been taken by the direction of the President pursuant to the authority vested in him by the act of August 29, 1916, 39 Stat. 619-645, known as the general defense act, and by section 10 of the act of August 10, 1917, 40 Stat. 279, the Lever Act. The order issued for its taking mentioned these two acts. Manifestly, we have nothing to do with a taking under section 10 of the Lever Act because the jurisdiction under that section is in the district courts, and not in the Court of Claims. See Pfitsch case, 256 U. S. 547. The distinction was noted by Mr. Justice Butler in the Seaboard

Air Line case, 261 U. S. 299, 305, when speaking of the North American Transportation & Trading Co. case, 253 U. S. 330. He says that the latter "was a suit in the Court of Claims based on an implied promise of the United States to pay for the property appropriated by it. It was not a condemnation case." The Pfitsch case was brought in a district court under the Lever Act.

In the instant case, the notice having referred to two acts, no reason is apparent why the plaintiff may not elect whether he will sue in the Court of Claims for a taking authorized by the first-named act or in the district court [fol. 36] under the Lever Act. The amount claimed would exclude any right to proceed in the district court under its concurrent jurisdiction with the Court of Claims. The plaintiffs' petitions state that "the United States is sued herein upon an implied contract under the general jurisdiction of this court," conferred by section 145, Judicial Code, showing plainly that their suits are for a taking under the authority of the general defense act. They are similar, therefore, to the case considered in the North American Transportation Co., 253 U. S. 330, where the question of the allowance of interest is fully considered and is not governed by the Seaboard Air Line case, supra, which was in the nature of a condemnation proceeding under the Lever Act. In the Duckett case, 266 U. S. 149, 150, the petition had an averment such as is above quoted, and in the opinion by Mr. Justice Holmes it is said the suit was on an implied contract. Duckett was suing for the taking of a part of the Bush Terminals just as the plaintiffs are here suing, and all three suits alleged an implied contract. In the Duckett case it is said (p. 152) "Whatever the effect of the taking, there was a contract, implied in fact, by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims," citing the North American Transportation case, supra. There can be no doubt that interest is not allowable on any claim founded on contract, express or implied, except as the statute, section 177, Judicial Code, allows it. The language of the statute is as follows:

"No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims,

unless upon a contract expressly stipulating for the payment of interest."

The terms of this statute formed a part of the act giving the Court of Claims authority to render judgments against the United States. Act of March 3, 1863, 12 Stat. 765, 766. It provided for interest on judgments at a stated rate and forbade the allowance of interest on claims prior to judgment. After the full review of the question in the North American Transportation Co. case, in the opinion by Mr. Justice Brandeis and the ruling there adopted we might content ourselves with a mere reference to that case but for the attempt to distinguish that case from this and a suggestion that there is an inconsistency between that case and that of the Seaboard Air Line. As already stated, Mr. Justice Butler, in the opinion in the Seaboard Air Line case, shows that the latter was not in the Court of Claims. It was therefore unaffected by section 177. It is not probable that Mr. Justice Brandeis, who wrote the opinion in the earlier case, and other justices who concurred in its conclusions would all have concurred in the Seaboard Air Line case if it overruled the one just mentioned. Nor is it possible that Mr. Justice Butler discovered an inconsistency between his reasoning in the Seaboard Air Line case and that of the case which he so carefully distinguished. The late amendment of section 177 whereby interest is allowed upon taxes erroneously or illegally collected emphasizes the fact that Congress has been very slow to permit interest on claims against the Government. The language of the statute is plain and courts of law have no dispensing powers. Of significance in this connection is the case of The Cherokee Nation, decided by the Supreme Court of the [fol. 37] United States April 12, 1926. It involved a question of interest and Mr. Chief Justice Taft, who delivered the court's opinion, announces the general congressional policy to be as shown in section 177, and says:

"When we consider the rule requiring an express provision of contract or statute to justify the imposition of interest in adjudicating any claim against the United States, we can find nothing in the circumstances of this case to increase the interest as adjudged. The additional interest now claimed is sought really as damages for the delay

of Congress in appropriating the sum due in 1895 as the United States promised in the 1891 agreement. But the rule as to interest against the United States does not allow us to adjudge interest as damages at all. Congress must expressly provide for it or the contract must so provide. The only contractual obligation here is for simple five per cent interest until payment."

It is argued that even if the recovery in this court be upon an implied contract, that contract is to make the "just compensation" provided for in the Fifth Amendment and the Seaboard and other cases, but the Seaboard case in particular is resorted to as justifying the contention that where there is delay in paying for the property the owner does not receive the just compensation required by the Constitution unless the delay is compensated for by the addition of interest. However, this contention overlooks the fact, admitted in argument, that the implied contract upon which recovery is had arises immediately upon the taking of the property and is therefore a contract to make the just compensation which is measured by the then value of the property, and in a suit upon that contract the court is confronted by the prohibitive provision of the statute.

If the suggestion that interest be computed but be not allowed as such does not sufficiently answer itself, the expression of the Chief Justice that we are not allowed to adjudge interest as damages at all would seem to set the question at rest. But the plaintiffs in their argument urge that the suits are not founded upon contract, but upon the Constitution of the United States—the fifth amendment requiring just compensation to be made for private property taken for public use. This argument overlooks the averment of the petitions to which we have adverted. But the question is a recurring one in this court and should be met. It is urged that the Tucker Act of 1887 gave an added jurisdiction to the Court of Claims which it did not have when the case of Great Falls Mnfg. Co., 112 U. S. 645, was decided, holding that the law will imply a promise to make the required compensation. Therefore the contention is that the suit is not, since the Tucker Act, founded on contract but upon the Constitution.

It may be noted in passing that the reasoning of the court

in Great Falls case, supra, is not confined to cases where there may be found "a meeting of the minds," as in contracts generally, but the court say (p. 656), that in the absence of condemnation proceedings "there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation." But upon what theory can it be maintained that the suit for just compensation is founded upon the Constitution as that phrase appears in the Tucker Act? It still requires legal authorization to take in order to render the Government liable. The taking is still an exer- [fol. 38] cise of the right of eminent domain, which does not rest upon and is not conferred by the Constitution. The fifth amendment does not confer the right of eminent domain but is only a condition of its exercise. Jones' case, 109 U. S. 513, 518. The argument that the claim of just compensation is based upon the Constitution is not an entirely new suggestion. It was made in the concurring opinion of Mr. Justice Brown in the Lynah case, 188 U. S. 445, but does not appear to have been followed at any time. In the court's opinion by Mr. Justice Brandeis in the North American Transportation & Trading Co. case it is said (p. 335): "The right to bring this suit against the United States in the Court of Claims is not founded upon the fifth amendment. This language is used in the court's opinion by Mr. Justice Sutherland in the Klebe case, 263 U. S. 188, 191. In the Peabody case, 231 U. S. 530, where a taking of land was claimed, Mr. Justice Hughes, delivering the opinion of the court, said (p. 539): "The suit must rest upon contract." See also 250 U. S. 1.

When the claim was again asserted in a subsequent suit, Portsmouth Co. v. United States, 260 U. S. 327, Mr. Justice Holmes, speaking for the court, said (p. 330): "If the act amounted to a taking, without assertion of an adverse right, a contract would be implied, whether it was thought of or not." In the Schillinger case, 155 U. S. 163, Mr. Justice Brewer refers to the statutes conferring jurisdiction on the Court of Claims, including the Tucker Act, and says (p. 167): "Under neither of these statutes had or has the Court of Claims any jurisdiction of claims against the Govern-

ment for mere torts; some element of contractual liability must be at the foundation of every action." The question of the suit being founded on the Constitution was urged in the dissenting opinion by Mr. Justice Harlan, but the court held the case to be one "sounding in tort," and said: "It is said that the Constitution forbids the taking of private property for public uses without just compensation; that therefore every appropriation of private property by any official to the uses of the Government, no matter however wrongfully made, creates a claim founded upon the Constitution of the United States and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress.

"This prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the Government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated language which had already been given a restrictive meaning would have been carefully avoided." Earlier than that one was the frequently cited case of Great Falls Manufacturing Co., 112 U. S. 645, placing the jurisdiction of the Court of Claims in cases of taking upon implied contract. This was prior to the Tucker Act, but unless its reasoning is correct it follows that the Court of Claims never had [fol. 39] any jurisdiction of cases seeking the just compensation guaranteed by the Fifth Amendment until after the Tucker Act. It would seem that Congress thought differently because they restricted the jurisdiction by the act of July 4, 1864, 13 Stat. 381, in claims growing out of the appropriation of property by the Army or Navy during the Civil War "from the commencement to the close thereof." See Russell case, 13 Wall. 623.

Speaking of the obligation of the Government to compensate the owner, the court says in the Russell case that

beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of his property. One of the earliest cases in the Court of Claims involving the liability of the Government for the taking or destruction of private property was that of William S. Grant, 1 C. Cls. 41, decided in March, 1864. The court took jurisdiction and gave judgment for what it found to be just compensation, holding that there was no distinction to be drawn between taking property to be used or taking it to be destroyed by or for the Government. In Johnson's case, 2 C. Cls. 391, 415, it is said that the Government can not be sued in actions sounding in tort, but that because of the constitutional provision "it has always been held that a party might recover upon the implied contract as though the property had been acquired under an agreement of purchase, leaving the price undetermined." See C. Cls., 248; Wiggins case, 3 C. Cls. 412, 422. It is not necessary to multiply cases.

It has been from the beginning of the Court of Claims until now consistently held that the liability of the Government to make compensation for private property taken in eminent domain is based upon the implied contract arising out of its obligation imposed by the fifth amendment to make just compensation. At this late day why should this well-established rule be changed? Saying that the claim is founded upon the Constitution can not possibly give a party more rights than he has when asserting his claim as one founded upon contract, so far as the question of interest is concerned. It was suggested in Mr. Justice Brown's opinion in the Dooley case that the words "not sounding in tort" in the Tucker Act are in terms referable only to the fourth class of cases as he defines them, the implication being that if the claim be founded on the Constitution or a law of Congress jurisdiction might be had of it even if sounding in tort. It was held that the claim for duties illegally exacted was based upon a law of Congress. In the Lynah case, supra, the concurring opinion of Mr. Justice Brown refers to the classification of cases of which the Court of Claims has jurisdiction and adds that in his view claims founded upon the Constitution may be prosecuted in the court "whether sounding in contract or in tort." The proposition thus asserted was relied

upon and urged by the claimant in Basso's case, 239 U. S. 602, but the Schillinger case was followed. The question would seem to be put at rest by the Holland-American Line case, 254 U. S. 148, where the Dooley case is again reviewed.

The statutory declaration that excludes jurisdiction of actions sounding in tort is no more distinct than the provision of the same statute prohibiting the allowance of interest. As already stated, the latter is the older of the two provisions because it was contained in the original act before the Tucker Act was passed; it was not changed [fol. 40] by that enactment and it was reenacted in 1911 as part of the Judical Code, 36 Stat. 1136. When Congress excepted claims for taxes from its operation they did not see fit to except claims for taking under the power of eminent domain. No interest was included in the judgments in the Lynah and Williams cases that originated in the district court sitting as a court of claims, nor in the Heyward case involving property adjoining that of Lynah, but which was tried in the Court of Claims, 52 C. Cls. 87, 250 U. S. 633. In the Welch case, 217 U. S. 333, and the Cress and Keely cases, 243 U. S. 316, no interest was allowed, while in the North American Transportation & Trading Co. case, appealed from the Court of Claims, it was expressly disallowed in view of the statute.

In no case finally determined and brought to our attention has interest been allowed against the United States where the suit originated in the Court of Claims or in a district court exercising concurrent jurisdiction with it, unless it be a case brought under some one of the statutes enacted during the World War and treated as a proceeding in condemnation. In another case in this court, Liggett and Myers Tobacco Co., decided February 15, 1926, an attempt is made to show how this court may proceed under special statutes in accordance with the suggestion of the Brooks-Scanlon case, 265 U. S. 106. It is proper to add that all of the judges are not agreed that interest as such is allowable in any case. Certain it is that Congress may prescribe the conditions upon which the Government may be sued and parties using it accept the conditions imposed in the act. McElrath case, 102 U. S. 426, 440. The rights not granted Congress has reserved to itself.

In the instant cases we rest our decision on the statute, mindful that it is no part of the function of the court to say what the law should be, but only to apply it as we find it.

Each of the motions for a new trial must be overruled.

Graham, Judge; Hay, Judge; and Booth, Judge, concur.

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[fol. 41] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 32,098. Court of Claims. Term No. 531. Charles H. Phelps, as surviving partner of Howard Phelps and Charles H. Phelps, copartners, trading under the firm name, etc., petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed July 27th, 1926. File No. 32,098.

Office Supreme Court, U.
FILED
AUG 24 1926
WM. R. STANSBU
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1926.

No. 531.

CHARLES H. PHELPS, as surviving partner of Howard Phelps and Charles H. Phelps, co-partners, trading under the firm name and style of Phelps Bros. & Co. (Claimant below),

*Petitioner,*

*against*

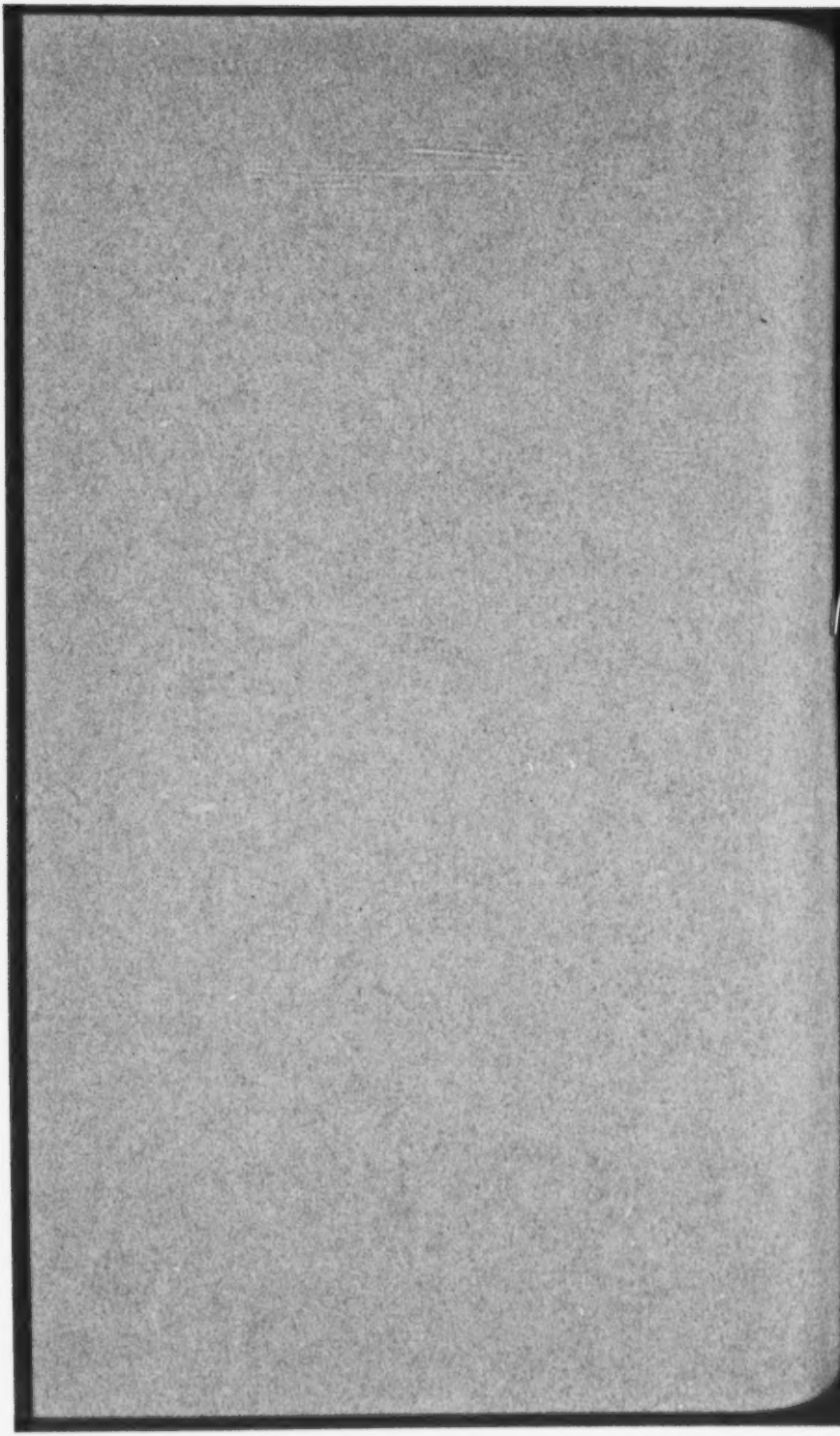
THE UNITED STATES OF AMERICA
(Defendant below),

*Respondent.*

## BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

CHARLES S. HAIGHT,
L. RUSSELL ALDEN,
*Counsel for Petitioner.*

The Hecla Press, 37 Warren St., N. Y. Tel. Walker 1450.



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# Supreme Court of the United States

OCTOBER TERM, 1926.

| | |
|---|---|
| CHARLES H. PHELPS, as surviving partner of Howard Phelps and Charles H. Phelps, co-partners, trading under the firm name and style of Phelps Bros. & Co., (Claimant below), Petitioner, against THE UNITED STATES OF AMERICA, (Defendant below), Respondent. | No. 531. |

**Statement Required by Supreme Court Rule 25.**

The volume which will contain the official report of the opinions delivered in the Court below has not been published.

The jurisdiction of this Court is invoked on the following grounds:

(1) The judgment to be reviewed was originally entered March 8, 1926 (R. 38). The petitioner was granted leave to move for a new trial (R. 38), which motion was argued and submitted May 3, 1926 (R. 39), and denied May 24, 1926 (R. 40-48). Time to apply for a writ of certiorari therefore runs from May 24, 1926 (*Citizens Bank of Michigan City, Indiana* v. *Opperman*, 249 U. S. 448).

(2) In this case petitioner sued in the Court of Claims for just compensation because of a taking of its leasehold interest in a pier at Bush Docks, New York Harbor, by eminent domain, pursuant to the Act of August 29, 1916, 39 Stat. 645, and the Act of August 10, 1917, Section 10, 40 Stat. 279 (Finding VII, R. 23). In the Court below petitioner asked that interest from the date of the taking be awarded as part of the just compensation to which petitioner was entitled (R. 15). The Court, on the original hearing (R. 37), and on motion for rehearing, refused to allow interest (R. 40). This denial of interest is the sole issue on this petition for writ.

(3) The Court of Claims had jurisdiction of this claim under Section 145 of the Judicial Code. This Court has jurisdiction to grant certiorari under Section 240 of the Judicial Code, Section 3, subdivision (b), as amended February 13, 1925. The power of this Court under this section is clear; the section, so far as we are aware, has not yet been construed by this Court.

## Allowance of Interest the Sole Question Presented.

The question presented is a very narrow one, whether the petitioner in this case is not entitled to the same "just compensation" which this Court awarded in the cases of *Seaboard Air Line* v. *United States,* 261 U. S. 299, and *Brooks-Scanlon Corporation* v. *United States,* 265 U. S. 106, namely, a just compensation which includes, as in those cases, compensation for several years of delay on the part of the Government in making any payment at all. A ruling against petitioner on this point deprives him of one-third of his actual loss. Our whole case is the proper construction of the above authorities, and *Duckett* v. *United States*, later referred to.

**The Seaboard Air Line and Brooks-Scanlon Cases.**

(a) *In the Seaboard Air Line and Brooks-Scanlon cases (supra) this Court did not award interest as interest, but as a part of "just compensation."* Your petitioner requests the same treatment. This Court in those cases made it clear that, although the statute did not allow interest, if "just compensation" required an allowance for delayed payment, it would award it, not as interest, but to produce the full equivalent of that value paid contemporaneously with the taking.

> "The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary *when interest or its equivalent is a part of such compensation.* Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. *Interest at a proper rate is a good measure by which to ascertain the amount so to be added"* (*Seaboard Air Line* case, *supra*, p. 306). (Italics ours.)

The Court could not more clearly say that Section 177 of the Judicial Code, which provides "that no interest shall be allowed unless it has been expressly stipulated for," does not apply to a "just compensation" case.

> "It is settled by the decisions of this Court that just compensation is the value of the property taken at the time of the taking. *Vogelstein & Co.* v. *United States,* 262 U. S. 337, 340; *United States* v. *New River Collieries Co.,* 262 U. S. 341, 344; *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299, 306; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 341. And, if the

> taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added" (*Brooks-Scanlon* case, *supra*, p. 123).

The whole discussion relates not to courts, forms of taking or proceedings thereon, but to the question, "What is just compensation?" Here, again, interest is not awarded *as interest*, a power which the Court of Claims would not have had, but, in fixing a fair and just compensation, the Court holds that it must take into account what the property owner has lost, *if he was not paid contemporaneously with the taking*, and that interest is "a good measure" for making this determination.

(b) *The Seaboard Air Line and Brooks-Scanlon cases made the award of just compensation, including interest, depend, not upon the statute authorizing the taking, but upon the Constitution itself.* Its ascertainment is said to be a judicial function. The same should be true in the case at bar. This Court said in the *Seaboard* case, *supra* (p. 304):

> "Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. *Its ascertainment is a judicial function.* Monongahela Navigation Co. v. United States, 148 U. S. 312, 327.
>
> The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. Monongahela Navigation Co. v. United States, 148 U. S. 312, 327. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken."

## The Duckett Case Directly in Point.

In the case of *Duckett* v. *United States*, 266 U. S. 149, which is on all fours with the case at bar and admittedly controlling here, this Court held that the taking was a lawful taking by eminent domain and that it called for just compensation and also held that the taking gave rise undoubtedly to an implied contract to pay.

Following upon that decision, the Court of Claims rendered a judgment in the *Duckett* case *including interest*, and the judgment had stood for nine months unquestioned at the time the case at bar was submitted to the Court of Claims for decision.

In the case at bar the Court of Claims reversed itself and held that no compensation for delay in payment can be allowed where there is an implied contract to pay—even though the case is one of eminent domain, under the Fifth Amendment; and subsequently amended the *Duckett* judgment so as to disallow the interest previously awarded.

The Court of Claims bases its action primarily upon the proposition that the case at bar is controlled, not by the *Seaboard Air Line* and *Brooks-Scanlon* cases, but by the case of *United States* v. *North American Co.*, 253 U. S. 330.

In contradiction of this view, we believe that it will be sufficient to set forth at the outset the principal elements in the *Duckett* case (and the case at bar) which are admittedly identical with those in the *Seaboard* and *Brooks-Scanlon* cases; and then to point out the controlling points of distinction between those cases and the *North American* case.

## Comparison of Seaboard Air Line Case, Brooks-Scanlon Case, Duckett Case and the Case at Bar.

Admittedly, in all four cases:

(1) There was a lawful taking by eminent domain (see particularly *Duckett* case, pp. 150-151).

(2) The order of requisition promised just compensation.

(3) The taking was under the Fifth Amendment. As to the case at bar, the Court of Claims said (R. 38):

> "Jurisdiction of this case is upon the implied contract arising out of the taking, together with the provisions of the Fifth Amendment."

The Fifth Amendment compels the payment of just compensation when private property is taken for public use by an exercise of eminent domain.

(4) The statutes pursuant to which the property was lawfully taken by eminent domain under the Fifth Amendment made no provision for the payment of interest (cf. the *Seaboard Air Line* case, *supra*, p. 304).

(5) The very nature of the taking contemplated a delay in actual payment. In the *Duckett* case, Mr. Justice Holmes, at page 150, particularly comments upon the words of the order (which was the same order as that under which the property was taken in the case at bar):

> "Steps will be promptly taken to ascertain the fair compensation to be paid."

Upon the subsequent appointment of a Board of Army Appraisers, it made this award about December 31, 1918, a year after the taking, to which date it allowed interest (58 Ct. Cl. 234, at 240).

## The North American Case Reviewed.

By contrast, in the *North American* case (*supra*):

(1) *There was no lawful taking by eminent domain.* This Court referred (bottom p. 333) to the Condemnation Acts of 1888 and 1890, under which the Secretary of War could have condemned the property, but he did not do so.

(2) *There was no order of requisition promising just compensation.*

(3) *The taking was* NOT *under the Fifth Amendment.* The Court said (at p. 335):

> "The right to bring this suit against the United States in the Court of Claims is not founded on the Fifth Amendment."

(4) Subdivisions 4 and 5 of the preceding point cannot be compared, because they deal with the form of the taking under an eminent domain statute, whereas there was no taking under an eminent domain statute in the *North American* case.

The following grounds of distinction in the *North American* case should also be noted:

(a) There, Appropriation Acts of 1899 and 1900 provided several million dollars for army contracts for quarters, supplies, etc., which gave authority for securing the troops' quarters in question (see p. 333).

(b) One General Randall used some land for his troops without first securing the approval of the Secretary of War to contract for it (p. 334).

(c) At the time of entering upon the land General Randall promised to pay for it (p. 332).

(d) This Court held that while General Randall originally had no authority to make such a promise, the Sec-

retary of War ratified and approved what he had done (p. 334).

(e) The land used was a Government tract in which the claimant merely had an equitable right, a staked out mining claim (see 53 Ct. Cl., p. 424).

(f) The encampment was occupied "subject to any legal rights which may exist within its limits" (p. 334). This did not affect the obligation of the Government to fulfill General Randall's promise to pay, when ratified, but it does show that there was no intention to take title by eminent domain. It was a contract case arising out of a ratified promise.

## Mistaken Inference Drawn by the Court of Claims from the North American Case.

Because in the *North American* case, which was one of common law contract and not a taking by eminent domain, interest was not allowed, the Court of Claims reasons that under no implied contract will a sum equivalent to interest be allowed.

This ignores the fundamental proposition that an implied promise must be co-extensive with the obligation created by the act giving rise to the promise. In the case of ordinary contract obligations arising apart from the protection of the Fifth Amendment, Section 177 of the Judicial Code forbids the giving of interest as interest. But upon a lawful taking in eminent domain under the Fifth Amendment, that amendment creates (independently of any statute) the obligation to pay just compensation and the implied promise to pay arising upon such taking must be commensurate with that obligation. It is and must be a promise to pay that just compensation which the Fifth Amendment guarantees and this Court has clearly defined what is the "just compensation" which

the Fifth Amendment guarantees and has stated that it must include compensation for delay in payment. This right rests upon the Constitution, not upon the terms of any statute, nor is it dependent upon methods of procedure. The computation in any given case is a judicial function. It must, whenever the Fifth Amendment applies, mean the same thing.

The Court of Claims argues that an implied promise to pay just compensation arising under the Fifth Amendment means something less than the statutory obligation to pay just compensation sued upon in the same Court (as in the *Brooks-Scanlon* case). It overlooks the fact that the obligation in the *Brooks-Scanlon* case really rests, *not* upon the statute, but upon the Fifth Amendment (for the statute gave no interest), and that its meaning and extent is determined by the Fifth Amendment as interpreted by this Court. So, in the case at bar, the meaning of "just compensation" is determined by the Fifth Amendment and needs no reiteration in the statute to give it reality. Nor can any statute destroy it.

> "Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute * * * it rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken" (*Seaboard Air Line* case, *supra*, p. 304).

That is what we ask. A writ of certiorari should be granted as prayed for in the petition.

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